No. 79-793

In the Supreme Court of the United States

OCTOBER TERM, 1979

HOUSTON LIGHTING AND POWER COMPANY, ET AL.,
PETITIONERS

v.

INTERSTATE COMMERCE COMMISSION, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE FEDERAL RESPONDENTS IN OPPOSITION

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-36a) is reported at 606 F. 2d 1131. The opinions of the Interstate Commerce Commission (Pet. App. 1c-46c, 1d-64d) are reported at 357 I.C.C. 683 and 358 I.C.C. 537.

JURISDICTION

The judgment of the court of appeals (Pet. App. 1b) was entered on June 26, 1979. A petition for rehearing (Pet. App. 1e) was denied on August 22, 1979. The petition for a writ of certiorari was filed on November 20, 1979. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether the Commission correctly applied the Interstate Commerce Act, as amended by the Railroad Revitalization and Regulatory Reform Act of 1976, in approving two proposed rates for the carriage of coal.

2. Whether the Commission's decisions were arbitrary or capricious.

STATEMENT

In these consolidated cases, the court of appeals affirmed two decisions of the Interstate Commerce Commission approving rates proposed by respondent railroads for the carriage of coal. In the first case, the Commission considered a proposed rate of $8.64 per ton for the transportation of coal from Gallup, New Mexico, to Cochise, Arizona, a trip of 523 miles. The rate was proposed in a tariff filed in June 1977 by the Atchison, Topeka and Santa Fe Railway Company (Santa Fe) and the Southern Pacific Transportation Company (Southern Pacific). In the second case, the Commission considered a proposed rate for the transportation of coal from Cordero, Wyoming, to Smithers Lake, Texas, a trip of 1,308 miles. The rate was proposed in June 1977 by Burlington Northern, Inc. and its subsidiaries (BN) and by Santa Fe. The carriers proposed to charge $15.60 per net ton (subject to an escalation formula) or, in the alternative, $16.54 per net ton (subject to general rate increases instead of an escalation formula).

In both cases, the carriers filed the proposed rates pursuant to 49 U.S.C. 10729,[1] a provision enacted as part of the Railroad Revitalization and Regulatory

[1]The Railroad Revitalization and Regulatory Reform Act of 1976, Pub. L. No. 94-210, 90 Stat. 31, was revised by the Act of Oct. 17, 1978, Pub. L. No. 95-473, 92 Stat. 1337, and codified as 49 U.S.C. 10101 *et seq.* We hereafter refer to the new sections of the Act as they will appear in the United States Code.

Reform Act of 1976 ("4-R Act"), which creates a new category of railroad rates called "capital incentive rates." Under Section 10729, the Commission must give expedited consideration to any proposed rate filed by a rail carrier for new services requiring a total capital investment of $1,000,000 or more. If the rate is found to be a capital incentive rate, it may not be set aside for a period of five years following the Commission's determination of lawfulness.

In its decisions, the Commission first held that the rates proposed in both cases were properly filed as capital incentive rates under Section 10729. In evaluating the lawfulness of the rates, the Commission considered evidence bearing on rates for comparable traffic, the variable and fully allocated costs of providing the services in question, and the carriers' need to attract equity capital (Pet. App. 1c-46c, 1d-64d). The Commission upheld the proposed rate of $8.64 per net ton for the movement from New Mexico to Arizona. It also sustained the proposed rate of $15.60 per net ton for the movement from Wyoming to Texas, but it held unlawful the alternative proposal of $16.54 per net ton as unreasonably high (Pet. App. 21c, 27d).

The court of appeals carefully reviewed the Commission's decisions and concluded that they were supported by substantial evidence, were consistent with statutory standards, and were accompanied by an adequate statement of the Commission's rationale (Pet. App. 21a-36a).

ARGUMENT

This case presents no conflict among the circuits or any legal issue of general importance warranting this Court's review. In substance, the Commission's decisions on the lawfulness of rates for two specific movements of

a commodity are based on the Commission's evaluation of the evidence pertaining to the rates on comparable movements, the costs of providing the particular services, and the economic return needed to attract equity capital. The court of appeals correctly held that the Commission did not exceed its broad discretion in ratemaking proceedings in resolving these factual issues.

1. At the outset, we note that despite considerable rhetoric reflecting petitioners' dissatisfaction with the Commission's decisions and the economic burdens that result from rate increases, it is difficult to determine what specific aspects of those decisions petitioners believe are erroneous and what specific legal issues they wish to present for this Court's review. The questions presented by petitioners (Pet. 2-3) do not focus on any legal errors, and much of their argument is in the same vein. Thus, petitioners object generally (Pet. 7-9, 12-14) to the Commission's reliance on the provision of the 4-R Act that requires the Commission to make a "continuing effort" to "assist [rail] carriers in attaining revenue levels" that "are adequate * * * to cover total operating expenses * * * plus a reasonable and economic profit or return (or both) on capital employed in the business" (49 U.S.C. 10704(a)(2)). But they do not dispute that such revenue levels are an appropriate consideration for the Commission in these cases, and they do not contend that the Commission relied exclusively on that consideration. Similarly, they object to the fact that these rates will be unassailable for five years under the capital incentive provisions of Section 10729 (Pet. 16-18), but they do not dispute the Commission's finding, affirmed by the court of appeals (Pet. App. 8a-20a), that these rates were properly filed as capital incentive rates under Section 10729.

In short, petitioners appear generally to claim that the Commission's decisions are arbitrary and capricious and that they do not adequately state the reasons supporting the conclusions reached. We believe such generalized and conclusory allegations are not sufficient to present any issue for this Court's review. In any event, petitioners' contentions are incorrect for the reasons summarized below and explained more fully in the decision of the court of appeals.

2. The record fully supports the court of appeals' conclusion that "the Commission's determinations * * * reflect full consideration of the evidence and the salient factors" (Pet. App. 26a). The Commission carefully evaluated several factors traditionally considered in determining the reasonableness of rail rates, including the following:

First, the Commission in both cases compared the rates proposed by the respondent railroads with other rail rates for the carriage of coal in the West. It accepted some rates as a valid basis for comparison and rejected others, explaining the reasons for its decision (Pet. App. 14c-16c, 19d-21d). The court of appeals noted (Pet. App. 27a) that this evaluation embodied a proper exercise of the Commission's expert discretion and found no basis to overturn it.

Second, the Commission evaluated both the variable and fully allocated costs of providing the transportation services to which the rates applied (Pet. App. 16c-17c, 22d-23d). The court of appeals concluded that the Commission's evaluation was supported by substantial evidence (Pet. App. 28a), and petitioners do not appear to challenge that determination here.

Finally, in determining whether the proposed rates (and the percentage by which they exceed variable and fully allocated costs) are just and reasonable, the Commission also gave consideration to the need of railroads to attract equity capital—the need for profitability that, under current economic conditions, will " 'serve as an encouragement and incentive for continued or new riskbearing ownership * * *' " (Pet. App. 22d, quoting from *Rules to Govern the Assembling and Presenting of Cost Evidence*, 337 I.C.C. 298, 393 (1970)).[2] The Commission found that consideration of this factor was consistent not only with traditional ratemaking principles but also with the provisions of the 4-R Act (49 U.S.C. 10704(a)(2)) which require the Commission to make a continuing effort to assist carriers in maintaining revenue levels sufficient to provide a reasonable return on capital (Pet. App. 15c-18c, 21d-25d).

Because Section 10704(a)(2) contemplates that the Commission will promulgate standards and procedures for establishing adequate revenue levels—a task that the Commission had not completed by the time of its decisions in these cases—the Commission declined to apply a specific formula to assess the issue of reasonable return on capital (Pet. App. 18c, 24d).[3] Rather, it relied

[2]This is similar to the familiar ratemaking principle that carriers may recover their cost plus a reasonable rate of return.

[3]Representative Eckhardt, in his brief amicus curiae, asserts (Br. 10-13) that the Commission erred in taking note of the statutory mandate to consider the railroads' need for equity capital, arguing that the Commission had not yet issued implementing rules. The affirmative requirement that the Commission implement this statutory provision by rules does not preclude its taking note of the text and purpose of the statute in rate cases decided prior to the issuance of implementing rules. Given the declared objective of the

on the need for a reasonable profit as an additional factor supporting its conclusion that two of the proposed rates were lawful. The court of appeals correctly held that this was consistent with the policies of the Act and the Commission's traditional evaluation of the reasonableness of proposed rates, which, as this Court has repeatedly recognized, is "unlike a problem in calculus, [and] cannot be proved right or wrong. [The relevant factors] are, indeed, only guides to judgment. Their weight and significance require expert appraisal." *New York* v. *United States*, 331 U.S. 284, 328 (1947). See also *Board of Trade of Kansas City* v. *United States*, 314 U.S. 534, 546 (1942): "The process of rate making is essentially empiric. The stuff of the process is fluid and changing—the resultant of factors that must be valued as well as weighed." For this reason, the Commission has necessarily been afforded "considerable flexibility" in ratemaking proceedings. *Baltimore & O.R.R.* v. *United States*, 345 U.S. 146, 150 (1953).

3. There is no merit to petitioners' suggestion (Pet. 9-10, 17-18) that, because other coal rate cases are pending before the Commission and the courts of appeals, this Court should review the decision below or, alternatively, should defer disposition of this case. Each of the other coal rate cases, like the present case, turns largely on its own particular facts, and each presents legal and factual issues different from this case. Furthermore, as the court below noted (Pet. App. 30a, 33a), the Commission's

statute to help the railroad industry achieve revenue adequacy, the court of appeals correctly held that the Commission properly considered the underlying statutory purpose in these cases. Moreover, as noted above, reasonable profitability was a factor relevant in ratemaking proceedings prior to the enactment of the 4-R Act.

decisions in the present case were rendered before its promulgation of revenue adequacy standards under Section 10704.[4] Finally, the capital incentive rate provision of the 4-R Act, Section 10729, which applies to these rates, requires expeditious rate determinations for the purpose of encouraging capital investment in the railroad industry. Deferring disposition of this case in the manner suggested by petitioners would frustrate the congressional objective in enacting this provision.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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[4]Moreover, in Ex parte No. 347, *Western Coal Investigation—Guidelines for Railroad Rate Structure* (May 17, 1978), the Commission instituted a rulemaking proceeding to develop more precise standards and guidelines for development of the western coal rate structure. That proceeding is currently pending. Accordingly, in the present case, as in other western coal cases, the Commission's approach has necessarily been an interim one, pending the formulation of standards in the comprehensive context of Ex parte No. 347.

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